85-1535

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

LUIS MANUEL VEREZ

and

MILTON VIDAL,

Petitioners,

vs.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE VIRGINIA SUPREME COURT

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QUESTION PRESENTED

I

Were the constitutional rights, under the Fourth Amendment of the United States Constitution, of the petitioners, Verez and Vidal, violated on October 2-3, 1983, by the forceful entry of law enforcement officers into their motel room without a search warrant or an arrest warrant, and should the evidence have been suppressed for such violations?

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IN THE
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No. _____

LUIS MANUEL VEREZ

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MILTON VIDAL, Petitioners,

vs.

COMMONWEALTH OF VIRGINIA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The petitioners, Luis Manuel Verez and Milton Vidal, respectfully pray that a writ of certiorari issue to review the decisions of the Virginia Supreme Court entered in this proceeding on November 27, 1985, and January 17, 1986.

OPINIONS BELOW

The orders of the Virginia Supreme Court dated November 27, 1985, and January 17, 1986, appear in the Appendix.

JURISDICTION

The order of the Virginia Supreme Court affirming petitioners' convictions was entered on November 27, 1985. A subsequent order denying petitioners' request for rehearing was entered on January 17, 1986, and this petition for certiorari is filed within sixty (60) days of entry of that order. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257.

STATUTORY PROVISIONS INVOLVED

Amendments to the United States Constitution:

IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

MOTION TO HAVE RECORD OF CASE SENT FROM VIRGINIA SUPREME COURT

Petitioners respectfully move the Court to have the entire record sent from the Virginia Supreme Court to assist the Court in the review of this very involved case.

STATEMENT OF THE CASE

Milton Vidal and Luis Manuel Verez were arrested illegally on October 3, 1983, and charged with unlawfully and feloniously possessing, with intent to give, sell, or distribute cocaine, a schedule II controlled substance. Preliminary hearings were conducted in the Hanover General District Court on November 4, 1983, and the matters were certified to the Hanover County Grand Jury. On November 15, 1983, the Hanover County Grand Jury indicted both Vidal and Verez. After the indictments, specifically, on January 10, 1984, and again on January 30, 1984, motions were heard to suppress the evidence in the cases of Milton Vidal and Luis Manuel

Verez on the grounds that they violated Vidal's and Verez's constitutional rights under the United States of America and the Commonwealth of Virginia constitutions.

On February 6, 1984, the appellant, Milton Vidal, was tried before a Hanover County jury, who returned a verdict of guilty and recommended a sentence of forty (40) years and a $25,000.00 fine. A presentence report was considered on June 11, 1984, and the appellant, Vidal, was sentenced by the Court to forty (40) years in the penitentiary of the Commonwealth of Virginia with fifteen (15) years suspended, and he is fined the sum of $25,000.00, of which sum the Court suspends $20,000.00.

As to Verez, he was tried without a jury on February 13, 1984, and was convicted. Verez was sentenced on April 30, 1984, after consideration of a presentence report, to confinement in the penitentiary of the Commonwealth of Virginia for the term of forty (40) years and fined the sum of $25,000.00. These two appeals were then noted.

All of the arguments presented in this petition and all of the cases in support of these arguments were placed before the Virginia Supreme Court.

The Virginia Supreme Court awarded the petitioners an appeal on the issue of the legality of the search and

seizure. The petitioners' appeals were consolidated for argument in the Virginia Supreme Court.

Following the filing of briefs and oral argument before that Court, the Virginia Supreme Court affirmed the petitioners' convictions on November 27, 1985.

On January 17, 1986, a petition to rehear was denied.

REASON FOR GRANTING THE WRIT

The Virginia Supreme Court's opinion of November 27, 1985, is plainly incorrect the petitioners respectfully submit.

The factual statement presented in the Virginia Supreme Court opinion leaves out the most important fact relevant to the issues before the Court; to-wit:

on direct examination, Cunningham admitted that Verez "indicated that he had it around him somewhere, I mean in his immediate vicinity,....He indicated he had it in hand." (See Appendix C). Since this conversation was monitored by the police, and since the police had monitored all the developments up to the phone conversation on the night of October 2, 1983, the police had no excuse for not obtaining an arrest or search warrant. Verez had even given the informants a description of the vehicle that had broken down.

The only offered basis for exigent circumstances in the opinion is that Verez might have been armed and the informers were in danger. Of course, none of these hindered the police from

obtaining a warrant. They had ample time, they knew they were going to send in the informers without any cash at least four (4) hours, and possibly months, before the 1:00 a.m. meeting. The police knew at 9:00 p.m. they were sending in the informers with no money and they were going to create the need for quick action. Certainly it was practical for them to have obtained a search or arrest warrant prior to the 1:00 a.m. entry.

The Court's opinion overlooks the guidelines of Welsh v. Wisconsin 104 S. Ct. 2091 (1984 at page 2097 and 2098. Welsh does more than just cite State v. Bennett 296 N.W. 2d 5 (Welsh at 2099) for the proposition that mere possession of controlled substances is not an

exigent circumstances to justify a warrantless entry. It also (pages 2097 and 2098) outlines the state and development of law regarding exigent circumstances for warrantless entry for searches and seizures. An examination of these pages and the cases cited, clearly showed that the Virginia Supreme Court's opinion is without precedent and in violation of long established principles.

The Welsh court on page 2098 points out that it has "actually applied only the 'hot pursuit' doctrine to arrests in the home", as being an acceptable exigent circumstances.

The petitioners refer the Court to the guidelines set out in United States v. United States District Court 407 U.S.

297 at 316 and 318.

Clearly, "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." United States v. U. S. District Court, 407 U.S. 297 at 318; Terry v. Ohio, 392 U.S. 1 at 20; Chimel v. California 395 U.S. 752 at 762.

The Court's opinion cannot be justified simply because the officers had probable cause to believe the drugs were in the motel room. "It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant." Agnello v. United States 269 U.S. 20 at

33. Taylor v. United States 286 U.S. 1 at 6.

The petitioners' position is that it was certainly practicable for the police to have obtained a search warrant. If it was practicable to meet well in advance to plan this operation (People v. Soto 465 N.Y.S. 2d 82), to discuss this matter with the Commonwealth's Attorney, to wire the informers, to surround the motel room, to discuss the matter with the motel management in advance, it was certainly practicable to obtain a warrant. The police could have called in advance to have ascertained the motel room or they could have called for a warrant when the informer arrived at the Clerk and determined the motel room.

The argument advanced by the respondent that Verez had previously met the informers at one place and then moved to another is not applicable to this situation. Vidal's car was broken down. The appellants were stranded at the motel room, and a Magistrate was available despite the argument offered by the respondent in its brief filed in the Virginia Supreme Court that a Magistrate was not available.

For a warrantless search to be valid it must fall within one of the narrow and well defined exceptions to the warrant requirement. Thompson v. Louisiana 105 S. Ct. 409. Since the Virginia Supreme Court's opinion offers no cases in support of these facts the petitioners must prevail.

United States Supreme Court cases "have not deviated from this basic Fourth Amendment principle.....Searches and Seizures inside a home without a warrant are presumptiously unreasonable absent exigent circumstances." United States v. Karo 104 S. Ct. 3296 (1984) at 3303.

The petitioners submit that the recent Karo case greatly assists their position on page 3303.

The court held on page 3303 "in this case, had a DEA agent thought it useful to enter the Taos residence to verify that the ether was actually in the house and had he done so surreptitiously and without a warrant, there is little doubt that he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. For

purposes of the Amendment, the result is the same where, without a warrant, the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house."

The petitioners argue that the use of informers, agents of the police, to surreptitiously gather information, is in principle no different than the use of a beeper deposited within the home to gather information. And under the Soto case if the informers had money with them to buy the drugs the petitioners' motions must be summarily granted. Certainly the Court is not encouraging endangering informers by not giving them money as an excuse for police illegal

activity. Justice William Douglas once warned in U.S. v. McDonald 335 U.S. 451, that "history has proven the police are not to be trusted."

The petitioners wish to comment on the opinion (page 8) reference to the trial Judge's "ruling" that the Commonwealth had proven exigent circumstances. No where in the record does the Hanover County trial judge find "exigent circumstances?" That word does not appear in his concluding statement. There is reference to the use of an informer as if one were breaking up a floating crap game, but the trial Court never, the petitioners submit, properly addressed the issue of exigent circumstances. The Virginia Supreme Court has affirmed a finding on page 8 of the

opinion which the petitioners submit, was never made, or was very vaguely and ambiguously made.

This case should have been decided also along the guidelines set out in Heaton v. Commonwealth 215 Va. 137; Carratt v. Commonwealth, 215 Va. 55. This case offers a classic example for a valid no knock entry - with a warrant.

The facts are clear and undisputed in this case.

Verez had dealt in drugs on previous occasions by selling them to Mr. Chase and Mr. Cunningham, who were police informants and who lived in the Northern Virginia area or the Washington, D.C. area. There had been telephone communication between Verez, Chase and Cunningham prior to Verez meeting Vidal and commen-

cing the journey from Miami to Virginia.

Mr. Chase and Mr. Cunningham were acting as informers for the police and they alerted the police when Verez was enroute with about one (1) kilo of cocaine. In fact, the police delayed Verez's trip to Virginia until it fit their convenience.

As Vidal and Verez traveled north through Virginia, Vidal's vehicle experienced some type of motor trouble and the two of them were more or less forced to register in the Kings Motor Inn, Room 205, in Ashland, Virginia. The room was registered to Vidal. Verez paid the bill for the room.

When the parties experienced car trouble and after they had decided to stay at the Kings Motor Inn, Verez

telephoned Mr. Chase and Mr. Cunningham to tell them of his difficulties and to inform them that he would be later than he thought, and suggested they meet him in Ashland. This call was made between 8:30 p.m. and 9:30 p.m. on October 2, 1983. Mr. Chase and Mr. Cunningham informed Verez that they would come to Ashland to the Kings Motor Inn rather than wait for Verez to get to Northern Virginia. At that time Verez told them "that he had it around him somewhere, I mean in his immediate vicinity..... He indicated that he had it in hand." (See App. C).

Why did the police not obtain a search warrant?

A warrant could have been requested at that time. It was not requested because, as Virginia State Police Officer Sam Gray testified at the Hanover County Suppression Hearing, "and at that time the plan was to arrest them and then obtain a search warrant."

Between 11:00 p.m. on October 2, 1983, and 1:00 a.m. on October 3, 1983, the police, accompanied by the Commonwealth's Attorney for Hanover County, arrived at the Kings Motor Inn, at which time they sent Mr. Chase and Mr. Cunningham into Room 205 to verify that the drugs and Verez were in that room. Vidal was unknown at this time during the transaction. Mr. Chase and Mr. Cunningham

did, in fact, go to Room 205, talked to Verez and met Vidal, and then Chase left the room to go to his vehicle. When Chase returned to the room and the door was opened by Vidal, a number of police, five to ten, entered the room and a shot was fired into the floor of the room. Vidal was pinned behind the door to the room.

In the room, about one (1) kilo of cocaine was found on the bed furthest from the door lying between Verez and Mr. Cunningham, who were sitting on the bed. Vidal was pinned behind the door when the officers invaded the room with their guns drawn. One officer fired his gun upon entry into the motel room.

Probable cause for issuance of a warrant exists when the facts and circumstances within the knowledge of the police officers involved would lead a man of reasonable caution to believe that a crime is being or is about to be committed or that seizable property is located at the premises in question. United States v. Sweeney, 688 F.2d 1131, 1137 (7th. Cir. 1982). Probable cause requires only a fair probability, not a prima facie showing of criminal activity. Illinois v. Gates, 103 S. Ct. 2317, 2332, (1983).

The search warrant should have been obtained based on the 9:00 p.m. phone conversation. The police had no indication that the accused were aware that they were dealing with informers or that

the transaction was being monitored, and they had no evidence that the accused were armed or that the informers were in any danger. The 1:00 a.m. arrest was made pursuant to a preconceived plan and not in response to any exigency. People v. Soto, 465 N.Y.S. 2d 82 at page 83.

United States v. Manfredi 722 F.2d 519, relied on by the Virginia Supreme Court, also fails to assist the Commonwealth. In determining whether exigent circumstances justify an exception to the general rule requiring a warrant, the burden rests on the government to show that the warrantless entry was "imperative." McDonald v. United States, 335 U.S. 451 at 456. The Manfredi case did not have a clear, definitive phone conversation as does this case wherein

the accused, at his room, said the drugs were "in hand" in "the immediate vicinity." The Manfredi case involved at least three different rooms six floors apart. The police, in fact, only had a middleman's verbal assurances that the suspects could provide cocaine. Quite a different factual situation from this case. In Manfredi the Court found exigent circumstances because of the risk evidence might be "destroyed" or that "an armed escape might be attempted." See Manfredi page 522. None of those facts or factors apply in this case. In Manfredi, it was not practicable to obtain a warrant. In this case it was practicable.

The Manley v. Commonwealth, 211 Va. 146, case similarly does not assist the Commonwealth. In fact, the Court in

upholding the warrant in that case pointed out that "the affidavit and warrant give the address of the apartment building and named the defendant as the person whose apartment was to be searched." Under the facts of this case, the officers could have obtained a similar warrant based on the 9:00 p.m. phone conversation. They could have confirmed the specific room number long before the 1:00 a.m. entry. There was no urgency in this case.

The respondent's reliance before the Virginia Supreme Court on United States v. Flickinger, 573 F2d 1349, is also misplaced. The Court pointed out "marijuana smuggling is not necessarily a crime of violence and there was no evidence of violence in this case." See Flickinger at page 1355.

The Court, also on page 1355, pointed out that "there was no indication that any of the people in the house were in possession of weapons."

The Court did not accept the government's premise that "anytime agents seek to effect an arrest or search of a residence, with or without a warrant, the possibility that persons inside might have access to weapons is very real and sometimes critical." The Court, on page 1355, commented "followed to its logical contention, however, the government's contention would obviate the necessity for a warrant in any arrest in a residence because every such arrest would involve the potential use of weapons. While we are critically mindful of the need for protection of arresting officers, we

cannot accept the full thrust of the government's arguments."

The Flickinger case involved a danger that suspects would be advised of the earlier arrests of other suspects and the increased danger to themselves. The Court noted that in "some cases we have treated the suspect's knowledge that he is at risk of immediate apprehension as an exigent circumstance." This case does not involve any such risks since no other suspects or earlier arrests were made.

The key point concerning a defendant being armed is that when a defendant becomes aware of some danger to himself he then becomes more dangerous. Certainly under the facts of this case nothing happened between 9:00 p.m., when Verez told where he was and where the drugs

were, and 1:00 a.m., to alert the appellants to any danger to themselves. And, of course, neither appellant was armed. They greeted the informers warmly.

Since the police officers elected to enter the motel room for the purpose of making an arrest without obtaining a search warrant, the petitioners' Fourth Amendment rights were violated. The Fourth Amendment applies equally whenever the police enter either for purposes of making an arrest or for a search and seizure. Payton v. New York, 445 U.S. 573, 585-88 (1980).

CONCLUSION

The petitioners respectfully request a writ of certiorari to issue.

LUIS MANUEL VEREZ
and
MILTON VIDAL

BY _____
Counsel

APPENDIX

APPENDIX A

Present: All the Justices

LUIS MANUEL VEREZ

v. Record No. 841111

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE
CHARLES S. RUSSELL
November 27, 1985

MILTON VIDAL

v. Record No. 841114

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF HANOVER COUNTY
Richard H. C. Taylor, Judge

In these cases the police entered a motel room without a search warrant or an arrest warrant, seized cocaine in plain view, and arrested the occupants. The defendants' consolidated appeals, based on the same set of facts,

challenge the legality of these actions by the police.

Officers of the Virginia State Police and the federal Drug Enforcement Administration (D.E.A.) had concluded that Luis Manuel Verez was engaged in the transportation of cocaine in kilogram lots from Florida to Northern Virginia. Verez had sold cocaine periodically over a five-year period to Raymond Cunningham and Russell Chase, who lived in Fairfax County. Unknown to Verez, Cunningham and Chase had become police informants, actively cooperating with the D.E.A. by the fall of 1983.

Although no actual transactions had taken place between Verez and the other

men since 1980, Verez still occasionally called Cunningham to inquire whether he was interested in a purchase. Having informed the D.E.A. of such a call in September 1983, Cunningham and Chase were instructed by D.E.A. officers to arrange a purchase of cocaine from Verez. They did so, and Verez agreed to drive to Northern Virginia to deliver the cocaine to them on September 29 or 30, 1983.

Verez did not appear on the appointed days, but called Cunningham at about 7:00 p.m. on October 2nd to say that he had been delayed, but that he was now in Virginia. At 9:00 p.m. that night, Verez called again and told Cunningham that his car had broken down at Ashland, that he was staying at the King's Motor

Inn there, and that Cunningham and Chase might drive to Ashland that night to consummate the drug transaction. The police monitored the 9:00 p.m. telephone conversation.

Verez had "hired" Milton Vidal to drive him to Virginia, and the two men were staying in a room registered in Vidal's name at the motel. In the 9:00 p.m. telephone conversation, Verez gave Cunningham a description of his car and the name of Vidal who was then unknown to Cunningham, Chase, or the police working on the case. Verez did not give Cunningham his room number at the motel.

D.E.A. agents and Virginia police officers accompanied Cunningham and Chase to Ashland and met with local police officers and the Commonwealth's

Attorney of Hanover County behind a shopping center near the motel late that night. In a discussion of tactics, the officers considered statements by Cunningham and Chase that Verez had a history of armed violence in prior drug transactions, that he had at least one companion, and that a frequent modus operandi in such transactions, sometimes used by Verez, was for buyer and seller to meet at a location where no drugs were present, insure that they were not watched or followed, and then move to another location to pick up the drugs. Consequently, the officers were uncertain whether the cocaine would be in the motel room, in Verez's car, or hidden at some other location.

The officers decided to send Cunningham and Chase into the motel room while they maintained surveillance from a distance. If the cocaine were to be produced in the room, Chase would leave on the pretext of returning to his car to pick up some "Clorox" with which to test the cocaine. He would signal the watching officers that the cocaine was actually in the motel room by removing his hat. When Chase returned to the room, the officers would "rush the door" when it was opened to readmit Chase. In the absence of a hat signal, they would try to follow Verez, Vidal, Chase and Cunningham to wherever they might go to get the cocaine. In order to try to obtain some advance indication of the

turn the transaction might take, the officers concealed a microphone in Chase's clothing but it transmitted poorly and produced little that was intelligible to the listening police.

Cunningham and Chase drove to the motel, inquired at the office concerning the room registered to Vidal, were told that it was room 205, called to be sure that Verez was present, and then drove to Room 205. Verez met them outside the room and looked about carefully, evidently to determine if they had been followed. The three entered the room, where Cunningham and Chase met Vidal. After pleasantries were exchanged, Vidal removed plastic bags containing approximately one kilogram of cocaine from a

closet and placed them on a bed.

Chase said that he had to return to his car to pick up some "Clorox" to test the cocaine. He left the room, went to his car, and removed his hat. Vidal, who had been watching Chase from the window, evidently saw nothing amiss in this performance, and opened the door to readmit Chase. Before he could close it, a number of police officers armed with drawn handguns and shotguns followed Chase into the room. Vidal was temporarily pinned behind the opened door and a shot was accidentally fired into the floor. The occupants of the room made no resistance. The cocaine was lying on the bed in plain view. The officers arrested all four occupants of the room,

but, of course, brought no subsequent charges against Cunningham and Chase. While in the motel room, Verez and Vidal signed a form consenting to a search of the room and their car. The search which followed produced nothing of further interest except a handgun holster and some bullets in the car.

Arrest warrants were issued for Verez and Vidal after they had been taken to the Hanover County jail. The defendants, indicted for possession of a schedule II substance with intent to distribute, filed joint motions to suppress the evidence, challenging the "illegal and warrantless entry into (their) motel room and (their) ultimate warrantless arrest(s)." They further

alleged that they had been subjected to an unlawful search and seizure. The court overruled the motions and the defendants were separately tried, Vidal by a jury and Verez by the Court. Both were convicted. The jury fixed Vidal's punishment at 40 years' confinement and a $25,000.00 fine, but the court suspended 15 years' confinement and $20,000.00 of the fine. At the end of Verez's bench trial, the court, after considering a presentence report, imposed a sentence of 40 years' confinement and a $25,000.00 fine. Although the defendants assigned several errors, we granted their appeals limited to the questions raised by their motions to suppress.

In a reversal of the positions frequently taken by parties in Fourth Amendment cases, the defendants here argue that the police had sufficient probable cause to obtain either search warrants or warrants of arrest* and should have obtained them before entering the motel room; the Commonwealth contends that it lacked such probable cause. The Attorney General argues that until the police found out which motel room the defendants occupied and ascertained by Chase's hat signal that the cocaine was actually present in the room, the police would have been "unable to describe with any particularity the place to be searched." See Manley v. Commonwealth, 211 Va. 146,

*The parties here make no distinction between the appropriateness of search warrants or arrest warrants in the circumstances of this case, but appear to agree that the same arguments apply to each. Accordingly, we shall not concern ourselves with any such distinction.

176 S.E.2d 309 (1970), cert. denied, 403 U.S. 936 (1971) (a search warrant directed against a multiple occupancy structure must describe the sub-unit with sufficient particularity to preclude the search of other units).

It is unnecessary to decide whether probable cause existed before Chase gave his hat signal. It is beyond question that it existed from the time the signals were given, and that the police were then justified by the exigent circumstances of the situation in entering the motel room, seizing the contraband found

there in plain view, and arresting the defendants for the felonies obviously then being committed. Even if we assume that the police had probable cause, before the signal was given, to obtain either a search warrant or warrants of arrest, in our view they were not required to do so. See Patty v. Commonwealth, 218 Va. 150, 155-56, 235 S.E.2d 437, 440-441 (1977), cert. denied, 434 U.S. 1010 (1978).

The Fourth Amendment protects the people against unreasonable searches and seizures, but not those which are reasonable in the circumstances. In Payton v. New York, 445 U.S. 573 (1980), the Supreme Court said: "In terms that apply equally to seizures of property

and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Id. at 590 (emphasis added). The Court had earlier equated the rights of a guest in a motel room with those of the rightful occupant of a house, for Fourth Amendment purposes. Stoner v. California, 376 U.S. 483, 490 (1964).

Exigent circumstances, however, may justify as reasonable a warrantless entry into a dwelling, a search of the interior, a seizure of contraband, and an arrest of those found in possession of it. Such warrantless entries into dwellings, followed by searches, seizures,

and arrests therein, however, are presumed to be unreasonable, in Fourth Amendment terms, casting upon the police a heavy burden of proving justification by exigent circumstances. Welsh v. Wisconsin, _____U.S._____, 104 S.Ct. 2091 (1984); Michigan v. Tyler, 436 U.S. 499 (1978); United States v. Santana, 427 U.S. 38 (1976); United States v. United States District Court, 407 U.S. 297, 313 (1972); Coolidge v. New Hampshire, 403 U.S. 443 (1971); McDonald v. United States, 335 U.S. 451, 459-60 (1948) (Jackson, J., concurring).

No Court has, to our knowledge, attempted to formulate a final and comprehensive list of all exigent circumstances which might justify a warrantless entry, but some of those

considered relevant have been: (1) the degree of urgency involved and the time required to get a warrant; (2) the officers' reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to others, including police officers left to guard the site; (4) information that the possessors of the contraband are aware that the police may be on their trail; (5) whether the offense is serious, or involves violence; (6) whether officers reasonably believe the suspects are armed; (7) whether there is, at the time of entry, a clear showing of probable cause; (8) whether the officers have strong reason to believe the suspects are actually present in the premises; (9) the likelihood of escape if the suspects

are not swiftly apprehended; and (10) the suspects' recent entry into the premises after hot pursuit. See, e.g., Welsh v. Wisconsin, ____U.S. at _____, 104 S. Ct. at 2097-98; Wallace v. King, 650 F.2d 527, 529 (4th Cir. 1980); Vance v. State of North Carolina, 432 F.2d 984, 990 (4th Cir. 1970).

We have held that in determining whether exigent circumstances were sufficient to overcome the presumption of unreasonableness and justify a warrantless entry, the court must examine the circumstances as they reasonably appeared to the law enforcement officers on the scene. "The officers are not required to possess either the gift of prophecy or the infallible wisdom that comes only with hindsight. They must be

judged by their reaction to circumstances as they reasonably appeared to trained law enforcement officers to exist when the decision to enter was made." Keeter & Bray v. Commonwealth, 222 Va. 134, 141, 278 S.E.2d 841, 846, cert. denied, 454 U.S. 1053 (1981).

Applying the foregoing principles, we find ample support in the record for the trial court's ruling that the Commonwealth had carried its burden of proving exigent circumstances sufficient to justify the warrantless entry. The officers waiting outside the motel room were confronted with a volatile, unpredictable situation. They knew that Verez had been armed and violent during similar transactions in the past, and they knew that he had at least one companion in the

room with him, also potentially armed. They knew that he was extremely watchful and vigilant against police surveillance. The microphone concealed in Chase's clothing was ineffective, and they could not determine, until they received his prearranged signal, whether the cocaine was in the room or concealed elsewhere. Vidal was keeping continuous watch through the window. If he had become suspicious of Chase, there would be a high probability of violence toward Cunningham, Chase, the nearby police, and, possibly, other guests in the motel. An armed attempt to escape was likely, as well as a high probability that the evidence, if present in the room, would be quickly destroyed. If the evidence were concealed outside the room, an entry

might be fruitless, leading to violence but allowing the contraband to remain undiscovered in the neighborhood. On the other hand, after Chase gave his signal, prompt action was imperative. Probable cause was then beyond question, and unless Chase reentered the room with funds to consummate the drug transaction immediately the dangerous consequences the police contemplated would become imminent.

In Lowe v. Commonwealth, 218 Va. 670, 239 S.E.2d 112 (1977), cert. denied., 435 U.S. 930 (1978), we held that knowledge, by police, of the presence of one and possibly two armed and violent criminals in a house justified a warrantless entry in order to assure their swift apprehension in the interests of the safety of the community and the police

themselves. See also Wright v. Commonwealth, 222 Va. 188, 278 S.E.2d 849 (1981); Keeter & Bray v. Commonwealth, 222 Va. 134, 278 S.E.2d 841 (1981); Carratt v. Commonwealth, 215 Va. 55, 205 S.E.2d 653 (1974).

On a set of facts similar to those before us here, a federal court held that the exigent-circumstances exception justified a warrantless entry by police into a motel room after receiving information that drug dealers, at least one of whom was thought to be armed and dangerous, had possession of a large quantity of cocaine in the room. The court observed:

> It was impossible to know how many minutes could be allowed to pass without arousing the waiting principals.....Once

> armed suspects in a drug transaction have been alerted to possible detection, the risk that delay in effecting an arrest will result in the destruction of the contraband and increase the danger of injury to the agents or others cannot be dismissed as merely speculative.

United States v. Manfredi, 722 F.2d 519, 523 (9th Cir. 1983).

We agree with that reasoning and conclude that the trial court correctly denied the defendants' motions to suppress. We will affirm the convictions.

Affirmed.

APPENDIX B

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 17th day of January, 1986.

Luis Manuel Verez, Appellant,

against Record No. 841111
Circuit Court Nos.
217-83 and 41-84

Commonwealth of Virginia, Appellee.

Milton Vidal, Appellant,

against Record No. 841114
Circuit Court No.
218-83

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 27th day of November, 1985, and grant a rehearing

thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/
Clerk

APPENDIX C

Q Well let me ask you a question. On either of these calls, the seven o'clock or nine o'clock call, did Mr. Verez indicate to you whether he had the lady with him?

A He indicated that he had it around him somewhere, I mean in his immediate vicinity.

Q Well tell us what words he used. What did he say, sir?

A He indicated that he had it in hand.

Q In where?

A In hand.

(8)

No. 85-1535

Supreme Court, U.S.
FILED
JUN 16 1986
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LUIS MANUEL VEREZ

AND

MILTON VIDAL,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THIS CASE MERITS REVIEW BY THIS COURT.

II. WHETHER THE VIRGINIA SUPREME COURT CORRECTLY HELD THAT PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES JUSTIFIED THE WARRANTLESS ENTRY AND ARRESTS OF PETITIONERS IN THEIR MOTEL ROOM.

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No. 85-1535

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LUIS MANUEL VEREZ

AND

MILTON VIDAL,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The petitioners assert that jurisdiction of this Court is grounded upon 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari at 3.

PRELIMINARY STATEMENT

References to the Petition for Writ of Certiorari will be designated "(Ptn. ___)." References to the appendix of the Petition for Writ of Certiorari will be designated "(App. ___)." References to the trial transcript dated January 10, 1984, will be designated "(Tr. ___)."

STATEMENT OF THE CASE

On November 15, 1983, Luis Manuel Verez and Milton Vidal were indicted by a Hanover County grand jury on charges that on October 3, 1983, they unlawfully and feloniously possessed cocaine with the intent to give, sell or distribute. Petitioners filed motions in the Hanover County Circuit Court to suppress the evidence alleging that they had been subjected to an unlawful search and seizure. (App. 9). On January 10, 1984, a suppression hearing was held, and the court overruled the motions. Petitioners renewed their motions, which were again overruled on January 30, 1984. (App. 10).

On February 6, 1984, Vidal was tried and convicted by a jury in the Circuit Court of Hanover County on the charges. Verez was tried and convicted of the charges on February 13, 1984, by the court without a jury.

Petitioners appealed their convictions to the Supreme Court of Virginia. The appeals, both of which were based on the same set of facts, were consolidated and on November 27, 1985, the court affirmed the convictions. *Verez* v. *Commonwealth,* 230 Va. 405, 337 S.E.2d 749 (1985). After petitioners' request for a rehearing was denied, they petitioned this Court for certiorari review.

STATEMENT OF THE FACTS

As a result of a joint investigation, officers of the Virginia State Police and the federal Drug Enforcement Administration (DEA) had concluded that Luis Manuel Verez was a large-scale cocaine trafficker engaged in the transportation of cocaine in kilogram lots from Florida to Northern Virginia. During the last five years, Verez had sold cocaine periodically to Raymond Cunningham and Russell Chase, residents of Fairfax County. (App. 2). Unknown to Verez, Cunningham and Chase had

become police informants actively cooperating with the DEA by the fall of 1983. (App. 2).

Although no actual transactions had taken place between Verez and the other men since 1980, Verez still occasionally called Cunningham to inquire whether he was interested in a purchase. (App. 2-3). Having informed the DEA of such a call in September 1983, Cunningham and Chase were asked by the DEA to arrange a purchase of cocaine from Verez. (App. 3). They did as asked, and Verez agreed to drive to Northern Virginia to deliver the cocaine to them on September 29 or 30, 1983. Verez "hired" Milton Vidal to drive him from Florida to Virginia. (App. 3-4).

Verez failed to show up on the appointed days, and failed to make any contact with Cunningham or Chase until October 2, 1983. (App. 3). That evening, at about 7:00, Verez called to say he had been delayed, but that he was in Virginia. (App. 3). At 9:00 p.m., Verez called again and told Cunningham that his car had broken down in Ashland and, therefore, if they wanted to complete the drug transaction, they would have to travel to Ashland. (App. 4). Verez said he was staying in a room registered in Vidal's name at the King's Motor Inn, but he did not give a room number. (App. 4). Verez told Cunningham the model and year of his car. (App. 4). Verez stated that he had the cocaine "in hand." From this statement, Cunningham inferred that Verez had the cocaine "around him somewhere" or "in his immediate vicinity." (App. 25).

DEA agents were with Cunningham and Chase when Verez called. (App. 4). The agents had to quickly devise an alternative plan to accommodate the sudden change of events. (App. 4-5). The drug transaction that was to have been completed three days earlier at a rest area in Northern Virginia, was now to be completed in the petitioners' motel room or elsewhere in Ashland in the middle of the night. (App. 5; Tr. 72, 82).

In making the tactical decisions of how to proceed, the agents considered the facts and information known to them. During previous transactions, Verez had been armed and violent, including taking over Cunningham's home at gunpoint. (App. 5; Tr. 74). On some occasions, Verez had other people with him who were armed. (Tr. 70). Verez had consummated drug deals

in numerous ways, including meeting in one location where no drugs were present, insuring that the participants had not been watched or followed, and then moving to another location to pick up the drugs. This *modus operandi* is common with drug dealers. (App. 5). The officers were unsure, from Verez's comment that the drugs were "in hand," whether the cocaine was in the motel room, Verez's car, in some other room, or in an entirely different location. (App. 5).

The officers decided to send Cunningham and Chase into the motel room to determine whether the drugs were in that room, while they maintained surveillance from a distance. If the cocaine were to be produced in the room, Chase would leave on the pretext of returning to his car to pick up some "Clorox" with which to test the cocaine. He would signal the watching officers that the cocaine was actually in the motel room by removing his hat. When Chase returned to the room, the officers would enter when the door was opened to readmit Chase. In the absence of the signal, they would try to follow Verez, Vidal, Cunningham and Chase to wherever they might go to get the cocaine. (App. 6). In order to monitor the transaction as it occurred, the officers concealed a microphone in Chase's clothing but it subsequently malfunctioned and produced little that was intelligible to the listening police. (App. 7).

Cunningham and Chase drove to the motel, inquired at the office as to which room was registered to Vidal, were told that it was room 205, called to be sure that Verez was present, and then drove to room 205. Verez met them outside the room and looked about carefully to determine if they had been followed. (App. 7). The three entered the room where Cunningham and Chase met Vidal. After pleasantries were exchanged, Vidal removed plastic bags containing approximately one kilogram of cocaine from a closet and placed them on a bed. (App. 7-8).

Chase said that he had to return to his car to pick up some "Clorox" to test the cocaine. He left the room, went to his car, and removed his hat. (App. 8). Vidal, who had been watching Chase from the window, opened the door to readmit Chase. Before he could close it, a number of police officers armed with drawn handguns and shotguns followed Chase into the room. (App. 8). The officers were armed because they had received information that these people were carrying guns. (App. 18-19).

The officers knew it was not unusual for narcotics traffickers to be armed. (App. 18, 21). Vidal was temporarily pinned behind the opened door and a shot was accidentally fired into the floor. The cocaine was lying on the bed in plain view. (App. 8-9). While in the motel room, Verez and Vidal signed a form consenting to a search of the room and their car. (App. 9). The search of the car produced a handgun holster and some bullets. (App. 9).

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT MERIT REVIEW BY THIS COURT.

A Writ of Certiorari is not a matter of right but of judicial discretion. It will be granted "only when there are special and important reasons therefor." Sup. Ct. R. 17.1. No such reasons exist here.

This case concerns application of well-settled Fourth Amendment principles to the unique facts and circumstances of what petitioners themselves describe as "this very involved case." (Ptn. 4). Furthermore, petitioners' argument largely turns upon a dispute over what inferences should be drawn from the evidence and whether it was practicable for the police to obtain a search warrant under the particular circumstances of this case. The precise factual issues raised by this case are unlikely to recur.

Petitioners challenge the Virginia Supreme Court interpretation of the record, even regarding whether the trial court had *ruled* that exigent circumstances were established by the prosecution justifying the warrantless entry. Petitioners contend that the ruling "was never made, or was very vaguely and ambiguously made." (Ptn. 18). This Court should not allow itself to be drawn into such a quagmire.

This case will have little, if any, impact beyond its own factual limitations. There do not exist any special reasons or circumstances for reviewing the decision in this case, and no new constitutional rule would be developed by any decision of this Court. Simply put, this is not a case which warrants certiorari review by this Court.

II.

THE DECISION OF THE SUPREME COURT OF VIRGINIA THAT THE WARRANTLESS ENTRY AND ARRESTS IN THIS CASE WERE BASED UPON PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND THE HOLDINGS OF OTHER FEDERAL COURTS.

A. Exigent Circumstances Mandated An Immediate Warrantless Entry Into Petitioners' Motel Room.

Petitioners contend that no exigent circumstances existed which mandated a warrantless entry into their motel room. In affirming the convictions, the Supreme Court of Virginia found the petitioners' contention at odds with prior decisions of this Court, of other federal courts, and with other Virginia decisions.

The Virginia Supreme Court's analysis was correct. The Fourth Amendment protects people against unreasonable searches and seizures, but not those which are reasonable under the circumstances. In *Payton* v. *New York*, 445 U.S. 573 (1980), this Court said:

> In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. *Absent exigent circumstances,* that threshold may not reasonably be crossed without a warrant.

Id. at 590 (emphasis added). This Court had earlier equated the rights of a guest in a motel room with those of the rightful occupant of a house for Fourth Amendment purposes. *Stoner* v. *California*, 376 U.S. 483, 490 (1964).

Exigent circumstances, however, may justify a warrantless entry. The prosecution bears the burden of justifying such an entry by exigent circumstances. *See Welsh* v. *Wisconsin*, 466 U.S. 740 (1984); *Michigan* v. *Tyler*, 436 U.S. 499 (1978); *United States* v. *Santana*, 427 U.S. 38 (1976); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *McDonald* v. *United States*, 335 U.S. 451, 459-60 (1948) (Jackson, J., concurring).

Many courts have addressed the "exigent circumstances" exception. Some of the factors considered relevant and which might justify a warrantless entry have been: (1) the degree of urgency involved and the time required to get a warrant; (2) the officers' reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to others, including police officers left to guard the site; (4) information that the possessors of the contraband are aware that the police may be on their trail; (5) whether the offense is serious, or involves violence; (6) whether officers reasonably believe the suspects are armed; (7) whether there is, at the time of entry, a clear showing of probable cause; (8) whether the officers have strong reason to believe the suspects are actually present on the premises; (9) the likelihood of escape if the suspects are not swiftly apprehended; and (10) the suspects' recent entry into the premises after hot pursuit. *See, e.g., Welsh,* 466 U.S. at 750; *Tyler,* 436 U.S. at 509; *Warden* v. *Hayden,* 387 U.S. 294, 299 (1976); *Ker* v. *California,* 374 U.S. 23, 40–41 (1963); *United States* v. *Davis,* 785 F.2d 610, 615 (8th Cir. 1986); *United States* v. *Turner,* 650 F.2d 526, 528 (4th Cir. 1981); *United States* v. *Kulcsar,* 586 F.2d 1283 (8th Cir. 1978); *United States* v. *Rubin,* 474 F.2d 262, 268 (3d Cir. 1973); *Dorman* v. *United States,* 435 F.2d 385, 392–393 (D.C. Cir. 1970); *Vance* v. *North Carolina,* 432 F.2d 984, 990 (4th Cir. 1970).

In determining whether exigent circumstances exist in a particular case which are sufficient to overcome the presumption that a warrantless entry is unreasonable, the courts must examine the circumstances as they reasonably appeared to the law enforcement officers at the scene. *See, e.g., Draper* v. *United States,* 358 U.S. 307, 313 (1959); *United States* v. *Manfredi,* 722 F.2d 519, 523 (9th Cir. 1983); *Turner,* 650 F.2d at 529; *Jackson* v. *United States,* 302 F.2d 194, 196–197 (D.C. Cir. 1962); *Taylor* v. *Commonwealth,* 222 Va. 816, 820, 284 S.E.2d 833, 836 (1981), *cert. denied,* 456 U.S. 906 (1982); *Keeter & Bray* v. *Commonwealth,* 222 Va. 134, 141, 278 S.E.2d 841, 846, *cert. denied,* 454 U.S. 1053 (1981). In the present case, the Virginia Supreme Court correctly pointed out:

> The officers are not required to possess either the gift of prophecy or the infallible wisdom that comes only with hindsight. They must be judged by their reaction

> to circumstances as they reasonably appeared to trained law enforcement officers to exist when the decision to enter was made.

Verez, 230 Va. at 411, 337 S.E.2d at 753.

Applying the foregoing principles to the facts of this particular case, the Supreme Court of Virginia correctly found that the Commonwealth had carried its burden of proving exigent circumstances sufficient to justify the warrantless entry into the petitioners' motel room. The officers had been prepared for a drug transaction where the parties were to meet in a public place, a rest area, in Northern Virginia. Under these original plans, the officers could have exercised more control over the situation. However, on the night the transaction was to be completed, Verez called and said his car had broken down. (App. 3). In order to complete the transaction, the informants and law enforcement officers had to drive to the King's Motor Inn in Ashland. (App. 3-4). The officers, assessing the situation, knew from their experience that it was not unusual for "dealers" to meet at one location to "verify the parties" and then move to another location to deliver the drugs. (App. 5). The officers also knew that Verez had previously consummated drug transactions in numerous ways, including meeting the buyers at one location to insure that they were not watched or followed, and then moving to another location where the drugs would be located. (App. 5). The officers had no way of knowing whether Verez's car had actually broken down. Certainly they were not required to accept Verez's explanation for the change in plans at face value. They could have reasonably believed that the change was just another way Verez chose to orchestrate a drug transaction.

Although Verez told Cunningham during the 9:00 p.m. phone call to Northern Virginia that he had the drugs "in hand," the officers and informants did not know if "in hand" meant actually in his hand, within hand's reach, in the immediate vicinity, or where Verez could get to them. Cunningham did not know from Verez's comment whether the drugs would be in the room, in the car, in some different motel room, or in an entirely different location. (Tr. 72). Assuming, *arguendo*, that having the drugs "in hand" literally meant in his hand, the drugs easily

could have been relocated between the time of the call and the informants' arrival in Ashland. Based on their experience and the information they had about Verez, the officers determined that they did not have sufficiently detailed information for a finding of probable cause to obtain a warrant for possession of cocaine with intent to distribute. The officers could not describe with particularity where the drugs were located.

Once in Ashland, Cunningham and Chase discovered which room was registered to the petitioners. Verez met them outside the room and looked about carefully to determine if they had been followed. The officers waiting outside the motel room were confronted with a volatile, unpredictable situation. They knew that Verez had been armed and violent during similar transactions in the past and it was reasonable and prudent to expect the same on this occasion. They also knew that Verez had at least one companion in the room with him who, based on their information, was probably armed. They knew that Verez was extremely watchful and vigilant against police surveillance. The microphone concealed in Chase's clothing was ineffective, and they could not determine, until they received the prearranged signal, whether the cocaine was in the room or concealed elsewhere. Vidal was keeping continuous watch through the window. If he had become suspicious of Chase, there would be a high probability of violence toward Cunningham, Chase, the nearby police and, possibly, other guests in the motel. An armed attempt to escape was likely, as well as a high probability that the evidence, if present in the room, would be quickly destroyed. If the evidence were concealed outside the room, an entry might be fruitless, leading to violence but allowing the contraband to remain undiscovered in the neighborhood.

After Chase gave his signal, prompt action was imperative. Probable cause to arrest was then beyond question, and unless Chase reentered the room with funds to consummate the drug transaction immediately, the dangerous consequences the police contemplated would become imminent. Clearly, exigent circumstances were present which justified the warrantless entry into the petitioners' motel room.

Other courts have reached the same result in cases with facts similar to those in the present case. For example, in *Manfredi,*

the United States Court of Appeals for the Ninth Circuit upheld a warrantless entry into the defendant's hotel room, finding that the DEA agents "had reason to believe these people had a gun and two and a half pounds of cocaine, and at least one of them was likely to be violent." 722 F.2d at 522. The agents also knew that the occupants of the rooms had sent a cohort to deliver cocaine to another room in the hotel. *Id.* The cohort had been arrested. Failure of the emissary to return as expected would inevitably alarm the occupants creating a substantial risk that the remaining cocaine might be destroyed and that an armed escape might be attempted. *Id.*

One of the defendants in *Manfredi* argued that (1) the agents had probable cause to obtain a warrant before the arrest of his "cohort" precipitated the crisis; (2) the emergency arising from these arrests was foreseeable and avoidable; and (3) the destruction of evidence and risk of harm were not certain or probable, but only possible. *Id.* at 523. The Court found that the agents had nothing but verbal assurances that the suspects could provide cocaine and that it was reasonable for the agents to permit the transaction to proceed until delivery of the drugs. *Id.* The Court also found that the agents pursued a reasonable course of action by identifying the suspects, securing the evidence, recovering the drugs and arresting the culprits. *Id.* Finally, as to the defendant's claim that there was only a possibility that the evidence would be destroyed or that the agents would be in danger, the Court said:

> Once armed suspects in a drug transaction have been altered to possible detection, the risk that delay in effecting an arrest will result in the destruction of the contraband and increase the danger of injury to the agents or others cannot be dismissed as merely speculative.

Id.

In *United States* v. *Palumbo*, 735 F.2d 1095 (8th Cir.), *cert. denied*, 105 S.Ct. 332 (1984), the court upheld a warrantless entry into the defendant's hotel room to arrest him for possession of cocaine with the intent to distribute. The original plan was for the informant to go to the defendant's hotel room, get the cocaine sample, and take it to another room where the

"buyer," a detective, was waiting to "complete the transaction." 735 F.2d at 1097. At the last minute, the officers learned via the transmitter on the informant, that a co-defendant intended to accompany the informant to the "buyer's" room. *Id.* Because the "buyer" could not actually give the co-defendant any money, the "buyer"/detective would have to arrest the co-defendant when he arrived. *Id.* The officers feared that Palumbo would become suspicious when the co-defendant failed to return in a short time and would destroy or remove the cocaine before they could obtain a warrant for his arrest. The court found that the officers' fear that Palumbo would become suspicious and destroy the cocaine was reasonable, and created an exigency sufficient to justify the warrantless entry and arrest. *Id.*

In the present case, the exigent circumstances apparent to the law enforcement officers were sufficient to justify the warrantless entry into the petitioners' motel room. The decision of the Supreme Court of Virginia was correct and consistent with the prior decisions of this Court and of other federal courts.

B. Assuming, *Arguendo,* That The Police Had Ample Time To Secure A Warrant After Probable Cause Was Established, The Subsequent Warrantless Entry And Arrests Based On Exigent Circumstances Were Still Valid.

Even assuming that before the exigent circumstances arose there was probable cause to obtain a warrant, the Virginia Supreme Court correctly noted that this did not vitiate the validity of the subsequent warrantless arrest. *Verez,* 230 Va. at 409-410, 337 S.E.2d at 752. This Court stated in *Cardwell* v. *Lewis,* 417 U.S. 583 (1974): "The exigency [necessitating seizure of an automobile] may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation necessitating prompt police action." *Id.* at 596.

In *United States* v. *Hultgren,* 713 F.2d 79, 87 (5th Cir. 1983), the court noted that unlike the nature of the "routine" felony arrest, where a given individual and a distinct crime is involved, the fluidity of an ongoing investigation of the distribution of

narcotics makes obtaining a warrant more difficult to time in the flow of events. In accordance with this Court's decision in *Cardwell,* the court ruled that where police officers are conducting an ongoing investigation, the officers are not required to seek a warrant as soon as probable cause arises. Rather, the officers may legitimately wait in order to gather additional evidence substantiating the crime, to ferret out any hitherto unknown individuals involved in the crime, or to discover any other offenses in which the suspect may be involved. *Hultgren,* 713 F.2d at 87. *See also United States* v. *Webster,* 750 F.2d 307 (5th Cir. 1984), *cert. denied,* 105 S.Ct. 2340 (1985); *Palumbo,* 735 F.2d at 1095; *United States* v. *Mitchell,* 538 F.2d 1230 (5th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977).

In this case, the police officers were involved in an ongoing narcotics investigation. The drug transaction had been delayed for several days, the site of the transaction had changed, and the police officers were unsure where the cocaine was located until informer Chase gave the planned signal. Finally, Verez was known to have been armed and violent during past drug transactions. Under these circumstances, the warrantless entry and arrests of petitioners were valid even if, *arguendo,* the police had had ample time to secure a warrant after probable cause arose.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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June 16, 1986

Supreme Court, U.S.
FILED
JUN 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

LUIS MANUEL VEREZ

and

MILTON VIDAL, Petitioners,

vs. Record No. 85-1535

COMMONWEALTH OF VIRGINIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF VIRGINIA

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED

I

WHETHER THIS CASE MERITS REVIEW BY THIS COURT?

II

WHETHER THE VIRGINIA SUPREME COURT ERRED IN ITS FINDING THAT THE SEARCH AND SEIZURE WAS LAWFUL, PARTICULARLY SINCE OFFICERS CREATED THE NEED FOR QUICK ACTION BY SENDING IN THE INFORMERS WITH NO MONEY AND WITH A FAULTY TRANSMITTER?

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arrest the petitioners and then obtain a search warrant. (Tr.p. 127). But what reasoning did the officers use to make that decision? Why did the officers not deem it practicable to obtain a warrant or to seek the guidance of a magistrate between the 9:00 p.m. phone call and the 1:00 a.m. entry? Why did the police not recognize that the petitioners were settled in a protected dwelling with protected privacy rights? Did the officers create exigent circumstances by sending in the informers with no money and with a faulty transmitter thereby making the entry and search illegal?

It is not just a dispute over inferences of evidence that the Virginia Supreme Court ignored that Verez indicated to the informer, as monitored by the police, the "lady" was with him. (App.C p. 25). How can any Court attempt to apply Fourt Amendment principles

without stating the facts the officers had to rely on in determining whether it was practicable to obtain a warrant?

Verez did not just say, as respondent asserts (p.3 Respondent brief) that the lady was "in hand". Cunningham testified Verez said "he had it around him somewhere, I mean in his immediate vicinity.....In hand." (App. C).

Petitioners are correct that the Virginia Supreme Court affirmed a vague or non-existing finding of exigent circumstances.

Findings of state courts are by no means insulated against examination by this Court. Spano v. New York, 360 U.S. 315, 316 (1959); Thomas v. Arizona, 356 U.S. 390, 393; Pierre v. Louisiana, 306 U.S. 354; Ker v. California, 374 U.S. 23 at 34.

THE VIRGINIA SUPREME COURT ERRED IN ITS FINDING THAT THE SEARCH AND SEIZURE WAS LAWFUL, PARTICULARLY SINCE THE OFFICERS CREATED THE NEED FOR QUICK ACTION BY SENDING IN THE INFORMERS WITH NO MONEY AND WITH A FAULTY TRANSMITTER.

The Virginia Supreme Court decision is at odds with prior decisions of this Court, federal and state courts, as cited in petitioners' petition.

The respondent omits case law cited by petitioners which sets out one of the basic rules in these cases. Clearly "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure." United States v. U.S. District Court, 407 U.S. 297 at 318; Terry v. Ohio, 392 U.S. 1 at 20; Chimel v. California, 395 U.S. 752 at 762.

The respondent ignores United States v. Karo, 104 S.Ct. 3296 at 3303. The

Court noted "At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." Karo, supra at page 3303.

The respondent ignores People v. Soto, 465 N.Y.S. 2d 82, a case almost identical to this one except the informer had money to buy the drugs. They ignore the clear distinction People v. Soto draws between an arrest pursuant to a preconceived plan (as in this situation) and an arrest pursuant to exigent circumstances. If the informers had money, as in prior buys from Verez, nothing would have happened constituting exigent circumstances. Verez was not armed and there is no objective evi-

dence in the record that either of these informers had ever seen him specifically harm anyone or do any violent act. He greeted them warmly.

Partly because police do not "possess the gift of prophecy", they must and should seek guidance from a magistrate if it is practicable to obtain a warrant.

Whether respondent wants to concede it or not, the task of the police and informers was made much easier when petitioners' vehicle broke down. There is no evidence in the record that Verez had ever lied or misled these informers so as to lead them to suspect his vehicle was not broken down or that the drug transaction was not going to take place in the motel room. The respondents' many suggestions to the contrary are largely a distortion of the pertinent facts.

There is not the slightest possibility that, as respondent argues in United States v. Palumbo, 735 F2d 1095, the petitioners would become suspicious or destroy the drugs. No other defendants or accomplices existed. The petitioners were shocked and surprised by the officers' entry and shot being fired.

The officers created exigent circumstances by sending the informers in with no money. The Palumbo court noted that "the important point is that the exigency, while perhaps not unexpected, was not created by the officers." Palumbo, supra, pg. 1097.

In United States v. Hultgren, 713 F2d 79 at 80, 88, the Court ruled that after a functioning transmitter had failed, the police could go in. In this case the police deliberately sent in the informers when they knew the transmitter was not

working properly. Again the police have created the need for quick action, the precise evil the Hultgren court warned against. See United States v. Hultgren, 713 F2d 79 at 80, 88.

While it was not practicable to obtain a warrant for a drug sale somewhere "in Northern Virginia", (Tr. p.72), or at a "rest area" (Tr. p. 82), it was practicable to have a warrant when the officers went in.

This court long ago settled in Gouled v. United States, 255 U.S. 298 at 305-306, that a lawful entry is that indispensable predicate of a reasonable search. Justice Brennan pointed out in Ker v. California, 374 U.S. 23 at 53 "rigid restrictions upon unannounced entries are essential if the Fourth Amendment's prohibition against invasion of the security and privacy of the

home is to have any meaning." Although Ker v. California, supra, involved in part the proposition that those possessing the drugs might dispose of the drugs, this case has no such concerns on the part of the officers when they had completed their plan and sent in the informers. The petitioners were just waiting like sitting ducks.....but in the privacy of their room!

CONCLUSION

A writ of certiorari should be awarded.

Respectfully submitted,

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